91-1639 (1)

Case Number:

Supreme Court, U.S.
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In the
UNITED STATES SUPREME COURT
OCTOBER TERM

Michael A. Nelson

Plaintiff-Appellant

Versus

Senator Sam Nunn's Office

Senator Wyche Fowler's Office

Congressman Richard Ray's Office

Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:

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QUESTIONS FOR REVIEW

Whether appellees (agencies funded by Congress) are explicitly excepted from definition of "agency" under 5 USCS 551(1).

Whether appellees are exempt from the requirements of the FOIA and Privacy Act under 5 USCS 552(f).

PARTIES TO THE PROCEEDINGS

Pursuant to the Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings in the Eleventh Circuit:

1. Michael A. Nelson, Appellant-Plaintiff

2. Senator Sam Nunn's Office, Appellee

3. Senator Wyche Fowler's Office, Appellee

4. Michael Davidson and Morgan J. Frankel, Attornies for Appellees, offices of Senator Nunn and Senator Fowler

5. Congressman Richard Ray's Office

6. Steven R. Ross and Michael L. Murray, Attornies for Appellee, Congressman Richard Ray's Office

7. Honorable Emmett Cox, 11th Cir. judge

8. Honorable Frank Johnson, 11th Cir. judge

9. Honorable Thomas Reavley, 5th Cir. judge*

10. District court Judge, Orinda D. Evans

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* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

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REPORTS OF OPINIONS DELIVERED IN THE CASE

Orders of the United States Court of Appeals for the 11th Circuit dated 1/21/92 affirming the judgements of district court contain unpublished opinion of the 11th Circuit delivered in these cases (App. 1-3).

Order of the United States district court for Northern District of Georgia dismissing appellant's cases for lack of jurisdiction contains opinion of district court delivered in these cases (App. 5-12).

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*Statutes chiefly relied upon are marked by asterisks.

STATEMENT OF JURISDICTION

Pursuant to 28 USCS Section 1254 this court has jurisdiction to review the appeal of the orders of the United States Court of Appeals for the Eleventh Circuit entered on January 21, 1992 by writ of certiorari. Petition for rehearing was denied on March 4, 1992.

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Rule 8(f) of U.S. Civil Procedure:

"All pleadings shall be so construed as to do substantial justice. Fed.R.Civ.P. 8(f)".

Rule 12(b)(1) of U.S. Civil Procedure:

"lack of jurisdiction over the subject matter".

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Appellant, Michael A. Nelson who is an innocent victim of a conspiracy which has subjected him to unlawful electronic surveillance and harassment under Foreign Intelligence Surveillance Act, 50 USCS 1801-1811, for the past decade, has reasons to believe that U.S. Senators Nunn and Fowler, and U.S. Representative Ray have been involved in either requesting and/or conducting/extending this illegal surveillance and harassment.

In order to access the information which may exist in the offices of the aformentioned members of the Congress concerning appellant, he sent requests for information under Freedom of Information Act (FOIA), 5 USCS 552 and the Privacy Act (PA) 5 USCS 552a to appellees. Getting no satisfactory response, appellant filed the above captioned lawsuits under FOIA & PA, in

district court on 6/22/90, 7/2/90, 7/5/90, versus Offices of Nunn, Ray, and Fowler, respectively alleging violations of the Acts.

Thereafter, in their motions to dismiss the complaints for lack of jurisdiction, appellees' Offices of Nunn and Fowler contended that Section 552(f) of the FOIA and Section 551(1) of Administrative Procedure Act excepts these offices from definiton of "agency" under FOIA and PA. Such contentions were based on the grounds that a) 551(1)(A) expressly exempts the Congress from definition of "agency", b) because offices of members of Congress were not mentioned among the other government agencies listed under 552(f), appellees were not "agency" under FOIA, and c) because section 552a(a)(1) of the Privacy Act in reference to Section 552(f) of the FOIA, defines "agency", appellees likewise were not "agency" under the Privacy Act.

In its motion to dimiss the complaint for lack of jurisdiction, appellee Richard

Ray's Office misrepresented complaint by claiming that (Nelson v Richard Ray's Office, No. 1:90-CV-1122, ND Ga) was (Nelson v Richard Ray). Appellee further stated that Nelson has brought suit against Richard Ray, member of the House of Representatives alleging violation of FOIA & PA. Based on such false claim appellee presented his defense on the grounds that a) the FOIA & PA do not create claims of action against individuals, but only against agencies and b) FOIA & PA decline to apply their restriction to Congress.

In his responses to deny motions of Offices of Nunn and Fowler, appellant demostrated that a) Section 551(1) excepts from the definition of "agency" only those government entities which are expressly listed under this section. Thus, offices of members of the Congress which are defined to be agencies funded by Congress (2 USCS 58c) are not excepted from such definition under Section 551(1), and b) Section 552(f) of

FOIA only expands the scope of 551(1), thus, offices of members of Congress not being mentioned under this section does not except them from definition of "agency" under the FOIA, and c) because section 552a(a)(1) of the Privacy Act cross references Section 552(f) of the FOIA in defining agency, appellees are "agency" under PA.

In his response to deny the motion of Ray's Office, appellant demonstrated that Ray's motion to dismiss the complaint was fraudulent, misrepresented the complaint, and its contentions in fact, lacked merit. However, in order to keep record clear, appellant also presented similar argument to what he presented in his responses to deny motions of offices of Nunn and Fowler. (See above paragraph).

On 9/10/90 per Judge Orinda D. Evans district court entered three orders granting the motions of defendants and dismissed these actions for lack of jurisdiction under Fed.R.Civ.P. 12(b)(1). (App. 5-12)

As grounds for such dismissals, district court contended that appellees-defendants were not "agency" under 5 USCS 552(1) and 552(f). In addition, despite the fact that in his complaints Nelson requested district court to enjoin defendant's withholding the records under Nelson's name, in her orders Judge Evans claimed that plaintiff asked that court enjoin Defendant's withholding the records under Nunn's, Fowler's, and Ray's name.

On appeal, Nelson contended that district court had jurisdiction to entertain his complaints. In his brief and reply brief filed in the Eleventh Circuit, appellant requested that Circuit reverse the judgement of district court. As grounds for such request, appellant produced substantial evidence which demonstrated that contentions of appellees and judgements of district court were based on misconstruction and distortion of provisions of 551(1) and 552(f) and were clearly erroneous.

However, in their brief filed in the 11th Cir., appellees requested that court affirm the judgment of district court. As grounds appellees presented contentions similar to their previous arguments and claimed exemptions from requirements of the FOIA & PA under 551(1) and 552(f).

Following the oral argument which was held on 12/10/91, on January 21, 1992, the 11th Circuit entered three orders affirming the judgments of district court (App.1-3). As grounds for these affirmances the 11th Cir. contended that Congress is explicitly exempted from both Freedom of Information and Privacy Act's disclosure requirements, 5 USCS 551(1) and 552(f).

Furthermore, on March 4, 1992, The Eleventh Circuit entered three orders denying appellant's petition for rehearing which demonstrated that such contention of that Circuit was clearly erroneous (App. 13-15). Also, on March 20, 1992, the Eleventh Circuit entered three other orders

needlessly denying appellant's motions for stay of mandate pending petition for writ of certiorari.

B. JURISDICTION IN THE COURT OF FIRST INSTANCE (DISTRICT COURT)

Pursuant to 5 USCS 552(a)(4)(B) (App. 17) and 552a(g)(1) (App. 18) which confer the jurisdiction to district court in such matters, district court had jurisdiction to entertain the complaint.

Pursuant to 28 USCS Section 1291, 11th Circuit had jurisdiction to hear appeals of the final orders of district court.

SCOPE OF REVIEW

1. The Eleventh Circuit has erroneously decided an important question of Federal Law which has not been, but should be settled by the United States Supreme Court. Rule 10.1(c)

2. Eleventh Circuit has decided appellant's

actions in a way that conflicts with applicable decisions of the United States Supreme Court. Rule 10.1(c).

The complaint should not be dismissed, unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief". Conley v. Gibson, 355 US 41, 2 L Ed 2d 84.

For the purpose of a motion to dismiss, material allegations of the complaint are taken as admitted. Walker Process Equipment, Inc. v Food Machinery, 382 US 172, 174-175, L Ed 2d 274, 249, 250, 86 S Ct 346 (1965).

When a case is decided on a motion to dismiss, a rather detailed examination of the allegations of the complaint and applicable statutes is necessary. Jenkins v. Mckeithen, 395 U.S. 411, 23 L Ed 2d 404, 412.

ARGUMENT AND CITATION OF AUTHORITIES

In its orders dated January 21, 1992, the Eleventh Circuit affirmed the judgments of district court dismissing the above captioned actions for lack of jurisdiction. In all three of its orders, the 11th Circuit states:

"Because Congress is explicitly exempted from both the Freedom of Information Act and Privacy Act's disclosure requirements, see 5 U.S.C. 551(1) and 552(f), we affirm the district court's dismissal for lack of jurisdiction.".

Orders of the 11th Circuit are very general, ambiguous, and do not provide any information regarding Nelson's allegations nor do they conduct any examination of the structure of the applicable statutes. On appeal, Nelson alleged that appellees, Offices of Nunn, Fowler and Ray were "agency" as defined under 5 USCS 551(1) and 552(f). Orders of the 11th Cir. do not directly address this allegation. Instead,

these orders contend that 5 USCS 551(1) and 552(f) except the Congress from the requirements of FOIA & PA. For the purpose of motion to dismiss, material allegations of the complaint are taken as admitted. Walker Process Equipment, Inc. v Food Machinery, 382 US 172, 174-175, L Ed 2d 274, 249, 250, 86 S Ct 346 (1965).

Furthermore, since complaints were decided on motions to dismiss in district court, 11th Circuit was required to conduct a detailed examination of the structure of applicable statutes and of the allegations of the complaint. Jenkins v McKeithen, 395 US 411, 412.

In addition, to hold such contention of the 11th Circuit applicable to these actions, there must be some showing that for the purposes of the FOIA & PA, these offices are the "Congress". However, in the course of proceedings of these actions in the district court and 11th Cir., appellees failed to produce any evidence which would

prove that pursuant to any statute of the United States or any precedent court case these offices were the "Congress". Consequently, orders of district court dismissing these actions for lack of jurisdiction and orders of the 11th Cir. affirming such judgments also failed to produce any evidence regarding this matter. This clearly shows that there is simply no factual basis for 11th Circuit's aformentioned contention. The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief". Conley v. Gibson, 355 US 41, 2 L Ed 2d 84.

However, based on the contention of the 11th Cir., in defining the scope of the issues appellant notes the following as the disputed issues:

1. Whether appellees (agencies funded by Congress) are explicitly excepted from definition of "agency" under 5 USCS 551(1).

2. Whether defendants are exempt from the requirements of the FOIA and Privacy Act under 5 USCS 552(f).

A. APPELLEES ARE "AGENCY" UNDER SECTION 551(1) OF ADMINISTRATIVE PROCEDURE ACT

Appellees claim that under 5 USCS 551(1) (App. 16) which expressly excepts the Congress from the definition of "agency", they are not "agency" under the Act.

Section 551(1) of Administrative Procedure Act (5 USCS 551 et seq.) in pertinent part states:

"For the purpose of this subchapter --

(1) "agency" means each authority of the government of the United states, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;".

The language of Section 551(1)(A) of Administrative Procedure Act (5 USCS 551 et seq.) only excludes the Congress from the definition of "agency". There is simply no

indication in this context that appellees are also excluded from this definition. Administrative Procedure Law (551(1)) applies to each authority of the government of the United States not expressly excepted, Stewart v. Penny, 238 F. Supp 821. Moreover, Constitution of the United States (Article I Sections 1, 2[1], & 3[1]) (App. 19-20) and 2 USCS The Congress, which define structure of the Congress have not considered these offices as Congress. Thus, these offices are not within the scope of "Congress" as mentioned in 551(1)(A).

In addition, 2 USCS 58c, (App. 22-25) which defines procedures concerning the creation of a separate account within the contingent fund of the Senate for Senators' Official Personnel and Office expenses, Senators' Account, considers a senator's office as "agency" funded by the Congress:

1. 2 USCS 58c(2) at line 8 states: "In addition the Senators' Account shall be used for the funding of agency contributions

payable with respect to compensation payable by such account..."

2. 2 USCS 58c(4) states: "On January 1, 1988 there shall be transferred to the Senators' Account, from the appropriation account for agency contributions, ..., so much of the moneys in such account as was appropriated for the purpose of making agency contributions for administrative, clerical and legislative assistance with respect to compensation ... and the moneys so transferred shall be available only for the payment of such agency contributions with respect to such compensation.".

Section 58c clearly shows that appellees are merely agencies funded by the Congress and, therefore, are outside of the meaning of the "Congress" as described in the Constitution (Article I Sections 1, 2 cl 1, & 3 cl 1) and 2 USCS The Congress.

The language of 551(1)(A) excepts the "Congress" from the definition of "agency", NOT the agencies funded by the Congress.

Because 551(1) does not explicitly except the "agencies funded by the Congress" from definition of "agency", appellees are "agency" under the Act.

In support of their contentions, appellees also refered to Kissinger v. Reporters Committee for Freedom of the Press, 445, U.S. 136, 145 (1980), Library of Congress is not "agency", and contended that, because Library of Congress is not "agency", offices of members of Congress likewise are not "agency". Such contentions of appellees are clearly erroneous. Kissinger is different from appellant's actions, mainly on the fronts that offices of members of the Congress are agencies funded by Congress (2 USCS 58c, See above), but, Library of Congress pursuant to 2 USCS Section 131-176 is Congress and falls within the scope of "Congress" as mentioned in 5 USCS 551(1). (See App. 26-28 for text of 2 USCS 131, 132, 132a, 132b, 133). Section 131 describes Collections composing Library

and its location (Capitol). Section 132 designates the departments of Library of Congress. Sections 132a-133 indicate that Library of Congress is overseen by Joint Committee of Congress which consists of the Chairman and four members of the Committee on rules and Aministration of the Senate and the chairman and four members of the Committee on House Administration of the House of Representatives.

Appellees are agencies funded by the Congress, are not expressly excluded from the definition of "agency" under Section 551(1) of the Administrative Procedure Act, are not within the scope of "Congress" as defined in Constitution and 2 USCS The Congress, and are authorities of the U.S. government, therefore, in compliance with the requirements of the Act are "agencies". The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief". Conley v.

Gibson, 355 US 41, 2 L Ed 2d 84.

Based on the analysis set forth above, appellant states that in its orders affirming judgments of district court, 11th Circuit has erroneously determined an important question of federal law by deciding that agencies funded by Congress are excepted from definition of "agency" under Section 551(1) of Administrative Procedure Act. This is contradictory to requirements of this statute which apply to each authority of the government which is not expressly excepted. Such matter has not been decided by the United States Supreme Court, and should be settled by this court.

Moreover, the way 11th Circuit has decided appellant's actions conflicts with the applicable decisions of the United States Supreme Court.

B. APPELLEES ARE "AGENCY" UNDER FOIA & PA

Based on Section 552(f) of the FOIA, appellees contend that because offices of

members of Congress are not listed among the other agencies under this section they are exempt from definition of "agency" under the FOIA and by cross reference (552a(a)(1)) under the Privacy Act.

Section 552(f) of the Freedom of Information Act, 5 USCS 552 (App 16) states: "For purpose of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President, or any independent regulatory agency.".

By section 552(f)* Congress intended to expand the definition of "agency" to include

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* Irwin (See next page) refers to 5 USCS 552(f) as 552(e). In 1986 section 552(e) of the FOIA was redesignated as section 552(f). See 5 USCS 552a, Reference in text (1988).

entities that may not have been considered agency under the section 551(1), Irwin Memorial Blood Bank v. American Nat. Red Cross, 640 F.2d 1501, 1503 (1981, CA9 Cal); See also H.R. Report No. 93-876 reprinted in 1974 U.S. Code Cong. & Admin. News 6267, 6274. (App. 29-30).

This demonstrates that Congress has enacted 552(f) only in order to expand the scope of Section 551(1). Thus, appellees, who are "agency" under 551(1) are not affected by such enactment. Furthermore, in defining agency, the true extent of Freedom of Information Act's expanded coverage under 5 USCS 552(f) is a matter to be developed by courts on a case-by-case basis; in view of myriad organizational arrangements adopted for getting business of government done, each arrangement must be examined in its own context, Irwin Memorial Blood Bank of San Francisco Medical Soc. v. American Nat. Red Cross at 1051. Appellees are authorities of

the United States Government and are not excluded from the definition of "agency" 5 USCS 551(1). Therefore, they are "agency" and should comply with the requirements of FOIA and PA.

Moreover, because Section 552a(a)(1) of the PA (App. 18-19) cross references section 552(f) of the FOIA in defining agency, appellants likewise are "agency" under the Privacy Act. Federal Privacy Act (5 USCS 552a) governs federal agencies, Ryans v. New Jersey Com. for Blind & Visually Impaired, 542 F Supp 841, 29 CCH EPD 32959.

Therefore, district court had jurisdiction to entertain the complaints and, Eleventh Circuit's affirmance of judgments of district court was improper. The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief". Conley v. Gibson, 355 US 41, 2 L Ed 2d 84.

The above analysis also shows that 11th

Circuit's order claiming that Congress is exempted from the definition of agency by the reason of 5 USCS 551(1) and 552(f) is partially correct. Congress is excepted from the requirements of FOIA & PA, only by the reason of 551(1)(A). Section 552(f) of the FOIA was enacted only to expand the definition of "agency" to include entities that may not have been considered agency under the section 551(1), Irwin Memorial, H.R. Rep. No. 93-876. Congress remained unaffected by enactment of 552(f).

C. ADDITIONAL CONTENTIONS OF RAY'S OFFICE

In the district court based on false claim that Nelson's lawsuit is versus Richard Ray as opposed to his office, and in the 11th Cir., based on improper application of Speech or Debate Clause (Constitution - Article I Section 6, cl 1), appellee, Ray's Office claimed exemptions from requirements of the FOIA & PA.

1. APPELLE'S CONTENTIONS IN DISTRICT COURT

Representative Ray's Office, in its motion to dismiss the complaint dated 8/16/90, claims: "Plaintiff has brought suit against the Honorable Richard Ray, Member of the House of Representatives...". This claim of the appellee, however, is fictitious and misrepresents this action, and conceals the material facts of the appellant's complaint. In his response to deny such motion, appellant emphasized the fact that his action is versus Congressman Richard Ray's Office, NOT Congressman Richard Ray.

On the basis of this false claim, in motion to dismiss, appellee presents its defense on two bases; a) The Freedom of Information Act and Privacy Act statutes specifically decline to apply their restriction to Congress, and b) The courts have found that they create rights of action against agencies only, not against individuals.

Based on these grounds appellee improperly requested the court to dismiss this action for lack of jurisdiction and failure to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(1) and (6). This shows that defendant was not able to provide any evidence to prove that Representative Ray's Office is exempt from the definition of "agency" under the Administrative Procedure Act (5 USCS 551 et seq.). Instead, through the use of a fictitious claim that Nelson's action is against Congressman Richard Ray, appellee tried to conceal the material fact of the complaint and to mislead the appellant.

Furthermore, in their motions to dismiss the complaint dated 7/27/90 and 8/8/90 both Offices of Nunn and Fowler stated that Nelson has filed the lawsuit versus Congressman Richard Ray. This strongly suggests that conduct of Ray's Office, claiming that Nelson's lawsuit is versus Congressman Richard Ray, as opposed

to Congressman Richard Ray's Office was orchestrated with Nunn's and Fowler's Offices in order to mislead or intimidate Nelson (pro se), to violate his rights and obstruct the proceedings of the law. Such conduct is nothing less than Conspiracy against rights, 18 USCS 241, Obstruction of Proceedings 18 USCS 1505, Misrepresentation 18 USCS 1001, and Conspiracy to interfere with Civil rights 42 USCS section 1985(2) & (3). (See App. 30-33 for text of statutes).

In his motion to dismiss the complaint Appellee failed to produce any evidence to prove that Representative Richard Ray's Office was exempt from the definition of "agency" under the FOIA & PA. Thus, district court's order granting appellee's motion to dismiss the complaint under 5 USCS 551(1) and 552(f) which do not exempt a representative's office from the definition of agency under the Act, was improper. All factual issues must be resolved in a manner favorable to the plaintiff. Quinones v.

Durkis, 638 F.supp. 865 (S.D. Fla. 1986). Complaint is to be liberally construed in favor of plaintiff. Conley v Gibson, 355 US 41 2 L Ed 80, 78 S Ct 99 (1957). All pleadings shall be so construed as to do substantial justice. Fed.R.Civ.P. 8(f).

2. CONTENTIONS IN THE ELEVENTH CIRCUIT

In its brief filed in the 11th Cir., appelle claimed exemption from requirements of FOIA and PA, by contending that there is no distinction between Members of Congress and their office staff. Appellee bases its claim on the Speech or Debate Clause (Constitution - Article I Sec. 6, cl 1) and Gravel v. United States, 408 U.S. 606, 616 (1972) and iterates a portion of this case: "[I]t is literally impossible, in view of the complexities of the modern legislative process ... for Members of Congress to perform their legislative tasks without their aides and assistants [who] must be treated as their alter egos ... for purposes

of applying the Speech or Debate Clause.". Appellee, however, has misapplied Gravel v. United States to this action. In Gravel, for the purpose of construing the Speech or Debate Clause, the Supreme Court has clearly indicated that in conducting the legislative tasks (privileged), Member and his aide are to be treated as one. Id at 616. However, the information that plaintiff sought to release such as copies of applications requesting the electronic surveillance of plaintiff which may have been prepared by Representative Ray's Office, are outside of the legislative tasks of Congressman Ray and are NOT Congressional records. Thus, under the teaching of Gravel, in this action Representative Ray and his aides or office staff shall not be considered as one and none should enjoy any immunity conferred to members of Congress by Speech or Debate Clause (Constitution - Article I, Section 6 Clause 1). Article I, Section 6 [1] in pertinent part states:

"They [Senators & Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be priviledged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.".

In review of text of Speech or Debate Clause, appellant notes that, when a member of the Congress engages in serious crimes he is not priviledged from arrest. While the speech or debate clause of Article I, Sec. 6 of the Constitution recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either member of Congress or his aid to violate an otherwise valid criminal law in preparing for or implementing legislative acts. Gravel v United States 588 US 606, at 589. Further, based on such precedent of the United States Supreme Court, apellant also notes that

unlawful engagement of the members of either House in electronic surveillance of an innocent citizen of this country (See Statement of Facts of this petition) is a serious crime and a civil liability (50 USCS 1809 & 110, See App. 34-35). In addition, the documents that may have been generated during such criminal course of conduct in the Offices of such Members are beyond legislative tasks and are therefore discloseable under the FOIA, PA, FISA, Common Law right, and Speech or Debate Clause of the Constitution.

Another way of testing that the contention of Appellee is clearly erroneous is by examining the contents of footnote 1 of appellee's brief. In this footnote appellee contradicts its contention and states:

"Appellant argues that the documents he seeks are not legislative in their nature and, thus, are not protected from disclosure. While the nature of the documents at issue

might be relevant in the context of Speech or Debate claim, see e.g. MINEPECO, S.A. Conticommodity Service, Inc., 844 F.2d 856, 862 (D.C. Cir. 1988), it is not on point in this instance.".

As clearly demonstrated above, in its contention defendant relies on Speech or Debate Clause, and in its footnote states that it is not on point in this instance. However, in MINEPECO, the United States Supreme Court has acknowledged the right of private litigants to compel the production of documents in congressional files that are not the product of legislative sphere. Id. at 863.

In continuation of its baseless argument defendant also refers to International Paper Company v. Federal Power Commisssion, 438 F.2d 1349 (2d Cir.), Cert. denied, 404 U.S. 827 (1971) as a parallel case and states:

"In that case, plaintiff attempted to circumvent the Court's determination that

the FOIA did not require disclosure of the requested records by arguing that the Federal Power Commission staff constituted an agency and therefore, that their memoranda were disclosable. The court declared the argument 'not tenable' and affirmed the district court's rejection thereof.". Id. at 1395.

This argument of Ray's Office, like its motion to dismiss the complaint lacks merit. In International Paper Company appellant argues that staff of Federal Power Commission is an "agency". There is no organization designated 'the staff'. Id at 1359. However, this action is against Congressman Richard Ray's Office (an organization) NOT against Representative Ray, as claimed in defendant's motion to dismiss, and NOT against Representative Ray's aides, employees/staff or any individual staff member as suggested by appellee.

Freedom of Information and Privacy Acts

do not create claims of action against individuals but agencies, Petrus v. Bowen, 833 F.2d 581, 582 (5th Cir. 1987). The fact that individual Members of the Congress are exempt from the requirements of the Acts does not automatically exempt the offices that are operating under the supervision of these individuals, such as Congressman Ray's Office, from the requirements of these Acts.

In support of its contentions appellee also relies on 2 USCS Section 60-1 (App. 20-21). Section 60-1 which consists of one paragraph, describes authority of officers of Congress over Congressional employees. However, this section does not contain any information which would sustain appellee's claim and to show that Ray's Office is exempted from definition of "agency" under the FOIA and the Privacy Act.

Appellee, Ray's Office further relies on 1 J. O'Reilly, Federal Information Disclosure section 5.02 at 5-5 (1990) ("Congress and its special agencies, such as

the General Accounting Office and the Library of Congress, are also excluded from the Act because they are outside of 'agency' status."). In review of pertinent sections of this book appellant notes that the text reflects the views of the author alone (See Preface). It is not an official U.S. Code nor is it the views of the United States Supreme Court. Furthermore, the author is not a party in this case, therefore, his views are irrelevant. However, in order to keep the record clear, appellant states that the aformentioned statement of the author as described in the following, is contrary to provisions of 5 USCS 551(1) and 2 USCS Sections 131-167, 478:

1. As explained in Section "A" of this petition, 5 USCS 551(1)(A) only excepts the Congress from definition of "agency". There is simply no indication in the text of this statute that "special agencies of Congress" are also excepted from such definition.

2. 2 USCS sections 131-176 which describe

the Library of Congress, does not refer to the Library as "special agency of Congress". Instead the text of these section particularly 131-133, (App. 26-27) clearly demonstrates that Library of Congress is within the Scope of the "Congress" as mentioned in 551(1)(A). Furthermore, 2 USCS section 478 (App. 28-29) which describes utilization of services of General Accounting Office (GAO), does not refer to this office as "special agency of Congress" either. This clearly shows that the expression "Special agency of Congress", is simply an invention of the author and does not have any factual basis.

Appellee also contends that even if Congressman Richard Ray's office were an agency separated and distinct from the Congress itself, the office would still be exempt from the FOIA and Privacy Act. In support of such argument, defendant claims that "The courts have interpreted the Freedom of Information Act exemption for

Congress as extending to the entire legislative branch". And, in order to prove its claim, defendant refers to Ethnic Employees of the Library of Congress v. Boorstin, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985); and Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 145 (1980). However, in these cases courts have only held that Library of the Congress is not "agency" under FOIA. Thus, the statement of the defendant stating that the courts have interpreted the FOIA exemption for the Congress as extending to the entire legislative branch is false and the contention of defendant that generalizes the application of these cases to the entire legislative branch is clearly erroneous.

Furthermore, these cases differ from this action mainly in the respect that pursuant to 2 USCS Sections 131-176 the Library of Congress is the Congress and Ray's Office is an agency funded by the Congress. Exemption from the definition of

"agency" under 5 USCS 551(1)(A) only applies to the Congress.

Sections 1 & 2 [1] of Article I of the Constitution and Title 2 of the U.S. Code do not consider a representative's office as the Congress. Furthermore, Congressman Ray's Office is an authority of the U.S. Government and is not expressly excluded from the definition of "agency", under Administrative Procedure Act (5 USCS 551(1) et seq.). Therefore, for all practical purposes, Congressman Ray's Office is an "agency" and is accountable to the requirements of the Freedom of Information and Privacy Acts. Test for determining whether arm of government has sufficient authority to justify classifying it as agency under Administrative Procedure Act (5 USCS 551 et seq.) is whether arm has authority to act with sanction of government behind it. Ellsworth Bottling Co. v United States, (1975, WD Okla) 408 F Supp 280.

The FOIA is sweeping legislation,

opening up "access to official information long shielded unnecessarily from public view". EPA v. Mink, 410 U.S. 73, 80,93 S.Ct. 827, 832, 35 L.Ed.2d 119, 128 (1973).

"The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.". NLRB v Robbins Tire & Rubber Co, 437 US 214, 242, 98 S. Ct. 2311, 2327, 57 L.Ed.2d 159, 178 (1978).

CONCLUSION

Based on the reasons set forth above, appellant states that apellees, offices of Nunn, Fowler, and Ray are "agency" as defined under 5 USCS Section 551(1). Because in defining "agency" section 552(f) of the FOIA cross references section 551(1), and section 552a(a)(1) of the Privacy Act cross references section 552(f) of the FOIA, these offices, are accountable to the requirements of FOIA & PA (5 USCS 552, 552a).

Thus, district court had jurisdition to entertain appellant's complaints and the 11th Circuit's orders affirming judgments of district court were improper and deprived appellant of due process of law.

Furthermore, in affirming judgments of district court, the Eleventh Circuit has erroneously determined an important question of federal law which has not been, but should be settled by the United States Supreme Court. In addition, Eleventh Circuit has decided appellant's actions in a way that conflicts with applicable decisions of the United States Supreme Court.

Wherefore, it is appropriate that the court grant appellant's Writ of Certiorari and review these actions for an exercise of court's power of supervision and settlement.

Respectfully submitted:

Mike Nelson

Michael A. Nelson
1290 Realm Lane
Lawrenceville, Ga. 30244
(404) 381-9530

APPENDIX

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-8977
D.C. Docket No. 1:90-CV-1406-ODE

Michael A. Nelson,

Plaintiff- Appellant

versus

Senator Sam Nunn's Office,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia
January 21, 1992

Before Cox, Circuit Judge, Johnson and Reavley*, Senior Circuit Judges.

PER CURIAM:

Because Congress is explicitly exempted from both the Freedom of Information Act and Privacy Act's disclosure requirements, See 5 U.S.C. 551(1) and 552(f), we affirm the district court's dismissal.

AFFIRMED.

---

* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-8979
D.C. Docket No. 1:90-CV-1465-ODE

Michael A. Nelson,

Plaintiff- Appellant

versus

Senator Wyche Fowler's Office,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia
January 21, 1992

Before Cox, Circuit Judge, Johnson and Reavley*, Senior Circuit Judges.

PER CURIAM:

Because Congress is explicitly exempted from both the Freedom of Information Act and Privacy Act's disclosure requirements, See 5 U.S.C. 551(1) and 552(f), we affirm the district court's dismissal.

AFFIRMED.

---

* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-8978
D.C. Docket No. 1:90-CV-1422-ODE

Michael A. Nelson,

Plaintiff- Appellant

versus

Congressman Richard Ray's Office,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia
January 21, 1992

Before Cox, Circuit Judge, Johnson and Reavley*, Senior Circuit Judges.

PER CURIAM:

Because Congress is explicitly exempted from both the Freedom of Information Act and Privacy Act's disclosure requirements, See 5 U.S.C. 551(1) and 552(f), we affirm the district court's dismissal.

AFFIRMED.

---

* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Michael A. Nelson,

Plaintiff

versus

Senator Sam Nunn's Office,

Defendant

Civil Number: 1:90-CV-1406-ODE

ORDER

This case is before the court on Defendant's motion to dismiss for lack of jurisdiction or for failure to state a claim on which relief may be granted pursuant to Fed.R.Civ.P. 12b(1) or b(6).

The amended complaint filed July 11, 1990 alleged that Plaintiff sought information from Defendant under the Freedom of Information Act, 5 U.S.C. 552("FOIA") and the Privacy Act, 5 U.S.C 552a. Getting no satisfactory response to such requests, Plaintiff now asks this court to

enjoin Defendant's withholding of agency records and records under Senator Nunn's name. Plaintiff also seeks an award of costs.

Inasmuch as Defendant is not "agency" as defined in FOIA Sec. 551(1) and 552(f), FOIA and the Privacy Act would not apply to Plaintiff's requests for information, FOIA 552(a). See, Paisley v. CIA, 712 F. 2d 686, 688 n.2 (D.C. cir. 1983); Holy Spirit Ass'n For the Unification of World Christianity v. CIA, 636 F.2d 838, 840-41 (D.C.cir. 1981).[1] Thus this court does not have jurisdiction over this case in the first instance. FOIA 552(a)(4)(B); Privacy Act 552a(g)(1). Plaintiff does not allege that any other provision of law confers jurisdiction to this court over this case.

---

[1] The FOIA and Privacy Act definitions and basis for jurisdiction are in relevant respect identical.

Accordingly, Defendant's motion to dismiss for lack of jurisdiction is GRANTED. Plaintiff's claims are DISMISSED for want of jurisdiction.

SO ORDERED, this 12 day of September, 1990.

ORINDA D. EVANS
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Michael A. Nelson,

Plaintiff

versus

Senator Wyche Fowler's Office,

Defendant

Civil Number: 1:90-CV-1465-ODE

ORDER

This case is before the court on Defendant's motion to dismiss for lack of jurisdiction or for failure to state a claim on which relief may be granted pursuant to Fed.R.Civ.P. 12b(1) or b(6).

The original complaint filed July 5, 1990 alleged that Plaintiff sought information from Defendant under the Freedom of Information Act, 5 U.S.C. 552("FOIA") and the Privacy Act, 5 U.S.C 552a. Getting no satisfactory response to such requests, Plaintiff now asks this court to

enjoin Defendant's withholding of agency records and records under Senator Fowler's name. Plaintiff also seeks an award of costs.

Inasmuch as Defendant is not "agency" as defined in FOIA Sec. 551(1) and 552(f), FOIA and the Privacy Act would not apply to Plaintiff's requests for information, FOIA 552(a). See, Paisley v. CIA, 712 F. 2d 686, 688 n.2 (D.C. cir. 1983); Holy Spirit Ass'n For the Unification of World Christianity v. CIA, 636 F.2d 838, 840-41 (D.C.cir. 1981).[1] Thus this court does not have jurisdiction over this case in the first instance. FOIA 552(a)(4)(B); Privacy Act 552a(g)(1). Plaintiff does not allege that any other provision of law confers jurisdiction to this court over this case.

---

[1] The FOIA and Privacy Act definitions and basis for jurisdiction are in relevant respect identical.

Accordingly, Defendant's motion to dismiss for lack of jurisdiction is GRANTED. Plaintiff's claims are DISMISSED for want of jurisdiction.

SO ORDERED, this 12 day of September, 1990.

ORINDA D. EVANS
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Michael A. Nelson,

Plaintiff

versus

Congressman Richard Ray's Office,

Defendant

Civil Number: 1:90-CV-1422-ODE

ORDER

This case is before the court on Defendant's motion to dismiss for lack of jurisdiction or for failure to state a claim on which relief may be granted pursuant to Fed.R.Civ.P. 12b(1) or b(6).

The amended complaint filed July 2, 1990 alleged that Plaintiff sought information from Defendant under the Freedom of Information Act, 5 U.S.C. 552("FOIA") and the Privacy Act, 5 U.S.C 552a. Getting no satisfactory response to such requests, Plaintiff now asks this court to

enjoin Defendant's withholding of agency records and records under Congressman Ray's name. Plaintiff also seeks an award of costs.

Inasmuch as Defendant is not "agency" as defined in FOIA Sec. 551(1) and 552(f), FOIA and the Privacy Act would not apply to Plaintiff's requests for information, FOIA 552(a). See, Paisley v. CIA, 712 F. 2d 686, 688 n.2 (D.C. cir. 1983); Holy Spirit Ass'n For the Unification of World Christianity v. CIA, 636 F.2d 838, 840-41 (D.C.cir. 1981).[1] Thus this court does not have jurisdiction over this case in the first instance. FOIA 552(a)(4)(B); Privacy Act 552a(g)(1). Plaintiff does not allege that any other provision of law confers jurisdiction to this court over this case.

---

[1] The FOIA and Privacy Act definitions and basis for jurisdiction are in relevant respect identical.

Accordingly, Defendant's motion to dismiss for lack of jurisdiction is GRANTED. Plaintiff's claims are DISMISSED for want of jurisdiction.

SO ORDERED, this 20 day of September, 1990.

ORINDA D. EVANS
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-8977
D.C. Docket No. 1:90-CV-1406-ODE

Michael A. Nelson,

Plaintiff- Appellant

versus

Senator Sam Nunn's Office,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING
March 4, 1992

Before Cox, Circuit Judge, Johnson* and Reavley**, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Michael A. Nelson, is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

---

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-8979
D.C. Docket No. 1:90-CV-1465-ODE

Michael A. Nelson,

Plaintiff- Appellant

versus

Senator Wyche Fowler's Office,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING
March 4, 1992

Before Cox, Circuit Judge, Johnson* and Reavley**, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Michael A. Nelson, is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

---

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-8978
D.C. Docket No. 1:90-CV-1422-ODE

Michael A. Nelson,

Plaintiff- Appellant

versus

Congressman Richard Ray's Office,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING
March 4, 1992

Before Cox, Circuit Judge, Johnson* and Reavley**, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Michael A. Nelson, is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

---

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

STATUTES, CONSTITUTIONAL PROVISIONS, ETC.

1. Administrative Procedure Act, 5 USCS 551(1) et seq.

a. Section 551(1) of the Act in pertinent part states:

For the purpose of this subchapter [5 USCS 551 et seq.]--
(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--
(A) the Congress;

2. Freedom of Information Act (FOIA), 5 USCS 552

a. Section 552(f) of the FOIA states:

For purpose of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Goverment (including the Executive Office of the President), or any independent regulatory agency.

b. Section 552(a)(4)(B) of the FOIA states: On complaint, the district court of the United States in the district which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

3. Privacy Act, (PA), 5 USCS 552a

a. Section 552a(a)(1) of Privacy Act in pertinent part states:

For purpose of this section--

(1) the term "agency" means agency as defined in section 552(e)* of this title;

b. Section 552a(g)(1) of the PA states:

Civil remedies. Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights or

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* Section 552a(a)(1) cross references Section 552(e) of the FOIA (5 USCS 552). In 1986 section 552(e) was redesignated as section 552(f). See 5 USCS 552a, References in text(1988).

opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

4. Constitution of the United States

a. Article I Section 1 states:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

b. Article I Section 2 [1] in pertinent part states:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.

c. Article I Section 3 [1] states:

The Senate of the United States shall be composed of two senators from each State, chosen by the Legislative thereof, for six Years; and each Senator shall have one Vote.

d. Article I Section 6 [1] states:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be priviledged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

5. Authority of officers of Congress over Congressional employees, 2 USCS 60-1

(a) Qualification determinations; removal and discipline:

Each officer of the Congress having responsibility for the supervision of employees, including employees appointed upon recommendation of Members of Congress, shall have authority--

(1) to determine, before the appointment of an individual as an employee under the supervision of that officer of the Congress, whether that individual possesses the qualifications necessary for the satisfactory performance of the duties and responsibilites to be assigned to him; and

(2) to remove or otherwise discipline any employee under his supervision.

(b) "Officer of the Congress" defined

as used in this section, the term "Officer of the Congress" means--

(1) an elected officer of the Senate or House of Representatives who is not a Member of the Senate or House; and

(2) The Architect of the Capitol.

6. Senators' Official Personnel and Office expense Account, 2 USCS 58c:

(1) Effective January 1, 1988, there will be, within the contingent fund of the Senate, a separate appropriation account to be known as the "Senators' Official Personnel and Office Expense Account" (hereinafter in this section referred to as the "Senators' Account").

(2) The Senators' Account shall be used for the funding of all items, activities, and expenses which immediately prior to January 1, 1988 were funded under either (A) the Senate appropriation account for "Administrative, Clerical and Legislative Assistance Allowance to Senators (Hereinafter in this section referred to as the "Senators' Clerk Hire Allowance Account") under the headings "SENATE" and "SALARIES, OFFICERS AND EMPLOYEES", or (B) that part of the account, within the contingent fund of the Senate, for "Miscellaneous Items" (Hereinafter in this

section referred to as the "Senators' Official Office Expense Account) which is available for allocation to Senatorial Official Office Expense Accounts. In addition, the Senators' Account shall be used for the funding of agency contributions payable with respect to compensation payable by such account, but moneys appropriated to such account for this purpose shall not be available for any other purpose. The Account, which in clause (A) of the first sentence of this paragraph is identified as the "senators' Clerk Hire Allowance Account" and the account, which in clause (B) of such sentence is identifed as the "Senators' Official Office Expense Account" shall, when referred to in other law, rule, regulation, or order (whether referred to by such name or any other) shall on and after January 1, 1988 be deemed to refer to the "Senators' Official Personnel and Office Expense Account".

(3)(A) Effective on January 1, 1988, there

shall be transferred to the Senators' Account from the Senators' Clerk Hire Allowance Account all funds therein which were available for expenditure or obligation during the fiscal year ending September 30, 1988, and from the Senators' Official Office Expense Account so much of the funds therein as was available for expenditure of obligation for the period commencing January 1, 1988, and ending September 30, 1988, except that the Senators' Official Office Expense Account shall remain in being solely for the purpose of being available to pay for any authorized item, activity, or expense, for which funds therein had been obligated, but not paid, prior to such transfer.

(B) Any of the funds transferred to the Senators' Account from the Senators' Clerk Hire Allowance Account pursuant to subparagraph (A) which, prior to such transfer, had been obligated, but not expended, for any authorized item, activity,

or expense, shall be available to pay for such item, activity, or expense in like manner as if such transfer had not been made.

(4) On January 1, 1988, there shall be transferred to the Senators' Account from the appropriation account for "Agency Contributions", under the headings "SENATE" and "SALARIES, OFFICERS AND EMPLOYEES", so much of the moneys in such account as was appropriated for the purpose of making agency contributions for administrative, clerical and legislative assitance to Senators with respect to compensation payable for the period commencing January 1, 1988, ending September 30, 1988; and the moneys so transferred shall be available only for the payment of such agency contributions with respect to such compensation.

(5) Vouchers shall not be required for the disbursement, from the Senators' Account, of salaries of employees in the office of a senator.

7. Library of Congress, 2 USCS 131-176

a. Collection composing; location, 2 USCS 131: The Library of Congress, composed of the books, maps and other publications which on December 1, 1873, remained in existence, from the collections therefore united under authority of law and those added from the collections theretofore united under authority of law and those added from time to time by purchase, exchange, donation, reservation from publications ordered by Congress, aquisition of material under the copyright law, and otherwise, shall be preserved in the Library building. The law library shall be preserved in the Capitol in the rooms which were on July 4, 1872, appropriated to its use, and in such others as may hereafter be assigned thereto.

b. Departments of Library, 2 USCS 132: The Library of Congress shall be arranged in two departments, a general library and a law library.

c. Appropriations for increase of general library, 2 USCS 132a:

The unexpected balance of any sums appropriated by Congress for the increase of the general library, together with such sums as may hereafter be appropriated to the same purpose, shall be laid out under the direction of the Joint Committee of Congress on the library.

d. Joint committee on the Library, 2 USCS 132b:

The Joint Committee of Congress on the Library shall, on and after January 3, 1974, consist of the chairman and four members of the Committee on Rules and Administration of the Senate and the Chairman and four members of the Committee on House Administration of the House of Representatives.

e. Joint Committee during recess of Congress, 2 USCS 133:

The portion of the Joint Committee of Congress on the Library on the part of the

Senate remaining in office as senators shall during the recess of Congress exercise the powers and discharge the duties conferred by law upon the Joint Committee of Congress on the Library.

8.Utilization of services of General Accounting Office, 2 USCS 478:

(a) Authority of General Accounting Office to furnish financial and administrative services. Financial and administrative services (including those related to budgeting, accounting, financial reporting, personnel, and procurement) and such other services as may be appropriate shall be provided the Office by the General Accounting Office.

(b) Scope of services and assistance. Such services and assistance to the Office shall include but not be limited to, all of the services and assistance which the General Accounting Office is otherwise authorized to

provide to the Congress.

(c) Services or responsibilities performed by General Accounting Office for Congress not altered or modified. Nothing in this section shall alter or modify any services or responsibilities, other than those performed for the Office, which the General Accounting Office under law performs for or on behalf of the Congress.

(d) Reimbursement for services and assistance. Services and assistance made available to the Office by the General Accounting Office in accordance with this section may be provided with or without reimbursement from funds of the Office, as agreed upon by the Board and the Comptroller General.

9. H.R. Rep. No. 93-876 reprinted in 1974 U.S. Code of Congress & Admin. News at 6274

DEFINITION OF "AGENCY"

For the purposes of this section the definition of "agency" has been expanded to include those entities which may not be

considered agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of "agency" for purposes of section 552 Title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishment within the executive branch, such as the U.S. Postal Service.

10. Conspiracy against rights, 18 USCS 241: If two or more persons conspire to injure, oppress, threaten or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or priviledge secured to him by the Constitution or laws of the United States, or because of his having to exercise the same; or ...

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

11. Statements or entries generally, 18 USCS 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fradulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

12. Obstruction of proceedings, 18 USCS 1505

This section in pertinent part states:

[W]hoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, ... shall be fined not more than $5,000 or imprisoned not more than five years, or both.

13. Conspiracy to interfere with civil rights, 42 USCS 1985:

(2) Obstructing justice; intimidating party: If two or more persons in any State or territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account

of his having so attended or testified ... or if two or more persons conspire for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

this subsection in pertinent part states:

[I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby exercising any right or priviledge of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

14. Criminal sanctions, 50 USCS 1809(a), (c)

1809(a) Prohibited activities

A person is guilty of an offense if he intentionally--

(1) engages in electronic surveillance under color of law except as authorized by statute; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

1809(c) Penalties. An offense described in this section is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both.

15. Civil liability, 50 USCS 1810

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 101(a) or (b)(1)(A) [50

USCS 1801(a) or (b)(1)(A)], respectively, who has been subjected to an electronic surveillance or about whom information obatined by electronic surveillance of such person has been disclosed or used in violation of section 109 [50 USCS 1809] shall have a cause of action against any person who committed such violation and shall be entitled to recover--

(a) actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater;

(b) punitive damages; and

(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

In the
UNITED STATES SUPREME COURT
OCTOBER TERM

Michael A. Nelson

Plaintiff-Appellant

Versus

Senator Sam Nunn's Office
Senator Wyche Fowler's Office
Congressman Richard Ray's Office

Defendant-Appellee

CERTIFICATE OF SERVICE

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No. 91-1639

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL A. NELSON, PETITIONER

v.

SENATOR SAM NUNN'S OFFICE

MICHAEL A. NELSON, PETITIONER

v.

SENATOR WYCHE FOWLER'S OFFICE

MICHAEL A. NELSON, PETITIONER

v.

CONGRESSMAN RICHARD RAY'S OFFICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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MAY 1992

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, the offices of two United States Senators and one Member of the House of Representatives, submit this opposition to petitioner's petition for certiorari. The petition seeks review of the Eleventh Circuit's affirmance of the district court's dismissal of petitioner's complaints seeking relief against these offices of the Senate and the House of Representatives under the Freedom of Information Act, 5 U.S.C. § 552 (1988), and the Privacy Act, 5 U.S.C. § 552a (1988). The Eleventh Circuit's determination

that the Freedom of Information Act and the Privacy Act do not apply to records maintained by Senators' or Congressmen's offices presents no difficult questions warranting this Court's review.[1]

STATEMENT OF THE CASE

Appearing pro se, the petitioner filed three similar suits against the congressional offices of Senator Sam Nunn, Senator Wyche Fowler, Jr., and Congressman Richard Ray. Following his submission of letters to all three offices denominated Freedom of Information Act/ Privacy Act requests, petitioner invoked the judicial review provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1988), and the Privacy Act, 5 U.S.C. § 552a (1988), and filed actions in the United States District Court for the Northern District of Georgia seeking injunctions ordering the congressional offices to provide to him records pertaining to him allegedly being withheld.[2]

The district court dismissed all three actions for lack of jurisdiction, because the congressional offices are components of the Congress, which is nct subject to the provisions of FOIA or the Privacy Act. The court held that "[i]nasmuch as" the congressional offices are "not an 'agency' as defined in FOIA §§ 551(1) and 552(f), FOIA and the Privacy Act would not apply to Plaintiff's requests for information, FOIA § 552(a)." Appendix to Peti-

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[1] Another petition filed by the same petitioner, seeking review of a separate order of the Eleventh Circuit, is currently pending before the Court. *Michael A. Nelson v. U.S. Department of Justice,* No. 91-1640 (S.Ct. filed Apr. 10, 1992). On April 23, 1992, the Solicitor General waived the filing of a brief in opposition to that petition, which presents different issues.

[2] Complaint at 3, *Nelson v. Senator Sam Nunn's Office,* Case No. 1:90-CV-1406-ODE; Complaint at 2, *Nelson v. Congressman Richard Ray's Office,* Case No. 1:90-CV-1422-ODE; Complaint at 4, *Nelson v. Senator Wyche Fowler's Office,* Case No. 1:90-CV-1465-ODE. In the case of Senator Nunn's office, petitioner also sought to amend his complaint to allege a failure to maintain accurate records for him in violation of the Privacy Act, 5 U.S.C. § 552a(e)(5), (g)(1)(C) & (D) (1988). Amended Complaint at 4.

tion for Certiorari ("Pet. App.") at 5, 8, 11 (typographical corrections to reflect original orders). Hence, the court held with regard to each lawsuit, "this Court does not have jurisdiction over this case in the first instance. FOIA § 552(a)(4)(B); Privacy Act § 552a(g)(1)." Pet. App. 5, 8, 11 (typographical corrections to reflect original orders).

Petitioner appealed to the Eleventh Circuit from the dismissal of his three actions. After briefing and oral argument, the court of appeals affirmed in all three cases, stating, "Because Congress is explicitly exempted from both the Freedom of Information Act and Privacy Act's disclosure requirements, *see* 5 U.S.C. § 551(1) and 552(f), we affirm the district court's dismissal." Pet. App. 1, 2, 3.

Petitioner's petition for certiorari was timely filed following the Eleventh Circuit's denial of his petitions for rehearing on March 4, 1992. Pet. App. 13, 14, 15.

REASONS WHY THE WRIT SHOULD BE DENIED

The Eleventh Circuit's affirmance on the ground that the Freedom of Information Act and Privacy Act do not apply to the Congress was correct and presents no issues warranting review.

The Freedom of Information Act imposes obligations upon "[e]ach agency" covered by the Act to "make available to the public information" meeting particular enumerated specifications. 5 U.S.C. § 552(a) (1988).

However, congressional offices are not covered by these requirements because the Congress is excepted from the definition of "agency" under the Act. Section 551 of Title 5 provides definitions for the subchapter of Title 5 that includes the Freedom of Information Act. Section 551 states, in pertinent part:

For the purpose of this subchapter—

> (1) *"agency"* means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but *does not include—*
>
> (A) *the Congress;* . . .

5 U.S.C. § 551(1)(A) (1988) (emphasis added).[3]

The final subsection of FOIA refines the application of this definition to FOIA by providing that, "[f]or purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f) (1988). Read together, section 551(1)(A) and section 552(f) unambiguously except the Congress from the reach of the Freedom of Information Act.

The Eleventh Circuit's reading of the express textual exemption of Congress from the scope of the Freedom of Information Act is consistent with this Court's prior decisions,[4] as well as those of other circuits.[5] "Since Congress is not an 'agency' " under FOIA, "documents within con-

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[3] The immediately succeeding subparagraph of section 551 excepts from FOIA "the courts of the United States." 5 U.S.C. § 551(1)(B) (1988). *See Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) ("the FOIA's exemptions for Congress and the federal courts are *in pari materia*," citing 5 U.S.C. § 551(1)(A) & (B)), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979) (per curiam), *cert. denied*, 445 U.S. 927 (1980).

[4] *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 145 (1980) ("[T]he Library of Congress . . . is not an 'agency' under the [Freedom of Information] Act.").

[5] *Paisley v. CIA*, 712 F.2d 686, 688 n.2 (D.C. Cir. 1983) ("Congress is not an 'agency' for purposes of that provision, *see* 5 U.S.C. § 551(1)(a) (1982) . . . ."), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (per curiam); *Holy Spirit Association for the Unification of World Christianity v. CIA*, 636 F.2d 838, 840-41 (D.C. Cir. 1981)("Congress has the authority to keep its records secret" because " 'agency' as defined in the Administrative Procedure Act does not include Congress," citing 5 U.S.C. § 551(1)(A)), *other portions of decision vacated and remanded as moot*, 455 U.S. 997 (1982); *Goland v. CIA*, 607 F.2d at 344 n.18 ("Congress is not an 'agency' under FOIA."); *id.* at 345 n.30 ("Congress exempted itself from the [Freedom of Information] Act's disclosure requirements; . . .").

gressional control are not subject to FOIA requests." *Paisley* v. *CIA*, 712 F.2d at 688 n.2.

Petitioner apparently doubts that Senators' and Congressmen's offices are part of the Congress. Obviously, and as petitioner surely recognizes, the Congress is composed of the Senate and the House of Representatives, which are made up, respectively, of 100 Senators and 435 Representatives. There can be no serious doubt that the offices of these Senators and Representatives are offices of the "Congress."

Petitioner's apparent view that the congressional exemption in the Freedom of Information Act applies only to auxiliary legislative branch agencies such as the Library of Congress, *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. at 145, but not to the Senate and the House themselves, Petition for Certiorari at 15–16, is refuted by common sense and by the precise text of the statute, which refers to "the Congress," 5 U.S.C. § 551(1)(A), not auxiliary legislative agencies.

Petitioner's argument is analogous to the contention that the Freedom of Information Act's exemption of "the courts of the United States," 5 U.S.C. § 551(1)(B), applies to the Administrative Office of the U.S. Courts and the Federal Judicial Center, but not to the Chambers of the Justices who comprise this Court. There can be no serious question that the textual exemption of "the courts of the United States" excludes from the Act's reach the records of Justices and judges of the federal courts. Analogously, there is no reason to review the Eleventh Circuit's unexceptionable determination that Senators' and Congressmen's offices are not covered by the Freedom of Information Act.

The Eleventh Circuit was also correct in affirming the dismissal of the petitioner's claims under the Privacy Act. Because the definition of "agency" under the Privacy Act incorporates the "agency" definition that applies to the Freedom of Information Act, *see* 5 U.S.C. § 552a(a)(1)

(1988),[6] the Privacy Act is similarly inapplicable to the offices of the Senate and the House of Representatives.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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STEVEN R. ROSS,
General Counsel to the Clerk of the House of Representatives.
Counsel for Congressman Richard Ray's Office.

MAY 1992.

[6] Section 552a(a)(1) cross-references 5 U.S.C. 552(e). In 1986 section 552(e) was redesignated as section 552(f). Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207, 3207-49 (1986). Section 552a(a)(1) was inadvertently not amended to reflect this renumbering change, but section 552a(a)(1) is intended to incorporate the definition that is presently contained in section 552(f). *See* 5 U.S.C. § 552a References in Text (1988) ("Section 552(e) of this title, referred to in subsec. (a)(1), was redesignated section 552(f) of this title by section 1802(b) of Pub. L. 99-570.").

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Michael A. Nelson, Petitioner

v.

Office of Wyche Fowler, Respondent

Michael A. Nelson, Petitioner

v.

Office of Richard Ray, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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May 18, 1992

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PETITIONER'S REPLY BRIEF

ARGUMENTS

Petitioner, Michael A. Nelson hereby submits this Reply Brief to address the issues raised in the Respondents' Brief in Opposition. Respondents' Brief seeks the denial of Petitioner's Petition for Writ of Certiorari. Respondents base their request on the following contentions:

CONTENTION I

Respondents contend that the Congress is exempt from definition of agency by the reason of 5 USCS 551(1)(A) and 552(f). Respondents Brief (Res. Brief) at 3-5.

While this Petitioner acknowledges that the Congress is exempt from the definition of "agency", for the purposes of the FOIA and the Privacy Act, (5 USCS 552, 552a) he states that such exemption is only by the reason of 551(1)(A). Section 552(f) of the Freedom of Information Act (FOIA) was

enacted to expand the scope of Section 551(1). By section 552(f) Congress intended to expand the definition of "agency" to include entities that may not have been considered agency under the section 551(1), Irwin Memorial Blood Bank v. American Nat. Red Cross, 640 F.2d 1501, 1503 (1981, CA9 Cal); See also H.R. Report No. 93-876 reprinted in 1974 U.S. Code Cong. & Admin. News 6267, 6274. Petitioner Brief (Pet. Brief) at 17-21). Congress remained unaffected by enactment of 5 USCS 552(f). This shows that the above contention of the Respondent is only partially correct.

CONTENTION II

Respondents contend that "there can be no serious doubt that offices of" the "Senators and Representatives are offices of the Congress". (Res. Petition at 5).

In deliberating such claim, Respondents have failed to provide any evidence which would prove that this claim is supported by

any rules or statutes of the United States or by any precedent court cases. This demonstrates that such contention of the Respondents in fact, is baseless. Moreover, such claim is contrary to provisions of 2 USCS 58(c) which defines these offices as agencies funded by the Congress. (Pet. Brief at 13-14).

CONTENTION III

Respondents state: "Petitioner's apparent view that the congressional exemption in the Freedom of Information Act applies only to auxiliary legislative branch agencies such as the Library of Congress,... but not to the Senate and the House themselves, Petition for Certiorari at 15-16, is refuted by common sense and by the precise text of the statute, which refers to "the Congress" 5 U.S.C. 551(1)(A), not auxiliary legislative agencies." (Res. Brief at 5).

Because of the following reasons

Petitioner states that this statement of the Respondents is fictitious and a distortion of Petitioner's views:

a. Nowhere in his Petition for Writ of Certiorari does the Petitioner refer to Library of the Congress as "Auxiliary legislative branch agencies". Such terminology is merely an invention of the Respondents. (See Pet. Brief at 15-16 for arguments regarding Library of the Congress).

b. Nowhere in his Petition does the Petitioner state that congressional exemption in the Freedom of Information Act does not apply to the Senate and the House of Representatives. Petitioner contended that congressional exemption in the FOIA does not apply to the OFFICES of Members of the Congress (Respondents).

CONTENTION IV

In an attempt to demonstrate that offices of Senators and Representatives are

exempt from definition of "agency" under the FOIA, Respondents improperly compare the offices of members of the Congress with the Chambers of the Justices of the Supreme Court of the United States. Following such comparison Respondents state that 551(1)(B) excludes from the FOIA's reach the records of the Justices and Judges of the federal courts. Based on such comparison Respondents further state: "Analogously, there is no reason to review the Eleventh Circuit's judgement.". (Res. Petition at 5).

This contention of the Respondents is improper. By such comparison and analogy Respondents simply claim that because the records of the justices and judges of the federal courts are outside of the reach of the FOIA, offices of members of the Congress are exempted from the requirements of the Act. This is a ridiculous contention and is completely lacking in merit. Petitioner's Petition seeks to determine whether offices

of the members of the Congress are "agency" under 5 USCS 552(1). Therefore, whether or not records of the Justices or judges of federal courts are beyond the reach of the FOIA, is irrelevant. Respondents have failed to produce any evidence which would support their claim and prove that based on the existing laws and/or precedents of this court they are excepted from the definition of "agency" under the Act. Instead, by improperly comparing themselves with the Chamber of the justices of this court and a baseless anology they have attempted to sustain their claim.

CONCLUSION

Based on the above analysis, Petitioner states that Respondents, offices of Nunn, Fowler, and Ray have failed to present any valid argument in opposition to the issues and the contentions raised in the Petitioner's Petition for Writ of Certiorari. Therefore, Offices of Nunn,

Fowler, and Ray are "agency" as defined under 5 USCS 551(1). Because in defining "agency" section 551(f) of the FOIA cross-references section 551(1) and section 552a(a)(1) of the Privacy Act cross-references section 552(f) of the FOIA, these offices are accountable to the requirements of the FOIA and PA (5 USCS 552, 552a), and orders of the 11th Cir. affirming judgment of district court were improper. (App. at 1-12)

Wherefore, based on the reasons set forth above and in Petition for Writ of Certiorari, it is appropriate that the court grant Petitioner's Petition for Writ of Certiorari and review these actions for an exercise of court's power of supervision and settlement.

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